Supreme Court, U.S.
FILED
APR 23 2002
OFFICE OF THE CLERK

(3)

No. 01-1149

In The

Supreme Court of the United States

MISSOURI RIVER SERVICES, INC.,
a Delaware corporation,

Petitioner,

v.

OMAHA TRIBE OF NEBRASKA,
a federally recognized Indian Tribe,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BRIAN A. MAGOON, ESQ.
JOHN G. NELSON, ESQ.*
BREGA & WINTERS P.C.
1700 Lincoln Street, Suite 2222
Denver, Colorado 80202
(303) 866-9400

Attorneys for Petitioner
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

11PP

TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT..... 1

ARGUMENT 2

A. This Court Should Grant This Petition Because The Eighth Circuit Erroneously Ruled That A Court May Vacate An Arbitration Award Which Satisfies All Criteria Set Forth In The FAA But (Assertedly) Violates Extra-Statutory Requirements Imposed By The Court, And This Ruling Conflicts With The Decisions Of Other Circuits 2

B. This Court Should Grant This Petition Because The Eighth Circuit Erroneously Ruled That Where A Question Possessing Jurisdictional Implications Is Intertwined With The Merits Of An Arbitration Decision, The Federal Courts Not Only May But Must Disregard This Decision... 5

C. Intervention By This Court Is Imperative 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 4, 5

Missouri River Services, Inc. v. Omaha Tribe of Nebraska, 267 F.3d 848 (8th Cir. 2001) 3, 6

Moses H. Cone Memorial Hospital v. Mercury Const. Co., 460 U.S. 1 (1983) 1, 7

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 7

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 1, 7

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 4

Swift & Co. v. United States, 276 U.S. 311 (1928) 7

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Missouri River Services, Inc. ("MRS") hereby submits the following Reply Brief in Support of Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

This Court should issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") for the following reasons.

First, this case presents important issues concerning the application and effect of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"). The FAA establishes a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Const. Co.*, 460 U.S. 1, 24 (1983); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). One of the most important questions that can arise under the FAA is the standard of review to be applied to an arbitration award – the precise subject presented by this Petition. Respondent, the Omaha Tribe of Nebraska ("Tribe"), does not deny that this issue merits the Court's attention.

Second, this case poses questions of first impression for this Court.[1] This lack of resolution is reflected in the profound circuit split identified in MRS' Petition for Writ of Certiorari. Once again, the Tribe does not even dispute

[1] The Court has addressed the questions presented in MRS' Petition for Writ of Certiorari only in dicta.

the existence of this circuit split or the need to bring order to this area of the law.

Third, this case provides a pristine factual background for the questions presented. The Tribe does not ever argue that this case may turn on a narrow factual issue, or that some obscure point in the record may prevent the Court from reaching these questions. As a result, this case offers the Court a promising vehicle for addressing the broad legal issues raised herein.

The Tribe's primary contention is that MRS misconstrued the Eighth Circuit's opinion. The Court readily can identify the errors in this claim by examining this opinion.

ARGUMENT

A. This Court Should Grant This Petition Because The Eighth Circuit Erroneously Ruled That A Court May Vacate An Arbitration Award Which Satisfies All Criteria Set Forth In The FAA But (Assertedly) Violates Extra-Statutory Requirements Imposed By The Court, And This Ruling Conflicts With The Decisions Of Other Circuits

The Tribe insists that the Eighth Circuit did not apply extra-statutory criteria in striking down the arbitration award. According to the Tribe, the Eighth Circuit's decision "had nothing to do with the merits of the case, but everything to do with the arbitrator's authority." Brief in Opposition at 9. This view is inaccurate.

The Eighth Circuit did not focus on whether the arbitrator was asked to decide the issues before her. This point was not open to serious question. Indeed, in an earlier phase of the case, the Tribe stipulated that each claim filed in the arbitration proceeding was subject to arbitration (App. at 58-60). The District Court entered an Order encapsulating this stipulation (App. at 47-48), and the Tribe did not appeal this Order.

Rather, the Eighth Circuit's inquiry focused on whether the arbitrator's decision was correct. The Eighth Circuit had access only to a "cold" record. As a result, the court was not well positioned to second-guess the arbitrator's decision. Relying on this record and its own views of the case, the Eighth Circuit determined that the arbitrator had erred.

The Eighth Circuit expressly based this decision upon non-statutory grounds. The Eighth Circuit first noted that the FAA provides for vacation of an arbitration award if the arbitrator exceeds the scope of his or her authority. *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 854 (8th Cir. 2001) (App. at 12). The Eighth Circuit then stated that "in addition to" this statutory criterium, an award may be set aside based upon non-statutory grounds. *Id.* at 854 (App. at 12). The Eighth Circuit concluded that MRS' arbitration award violated these judge-made criteria. *Id.* at 855 (App. at 12) ("we find that the award failed to draw its essence from the agreement").

The Tribe later suggests that even though the Eighth Circuit did apply non-statutory criteria, its decision still did not conflict with the decisions of other circuits. Brief

in Opposition at 11-12. According to the Tribe, "[t]he very language which supposedly creates the conflict among circuit courts has been used, not only by the Eighth Circuit in this case, but also by the United States Supreme Court itself." *Id.* at 12. This may be so. The fact remains, however, that the case law of Second, Fifth, Seventh, and Ninth Circuits expressly holds that an arbitration award may be vacated only upon the grounds set forth in the FAA, while other circuits hold otherwise. The Tribe does not even deny the existence of this disagreement.

Moreover, the Tribe's assertion that this Court already has ruled that the lower courts may strike down arbitration awards based upon non-statutory criteria is erroneous. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), concerned labor arbitration. This case did not apply or construe the FAA. Further, this decision, which is over 40 years old, may not reflect the modern view of arbitration. *See* Petition for a Writ of Certiorari at 21-23 for a discussion of changing judicial perspectives on arbitration.

The second case cited by the Tribe, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), was decided under the FAA. The issue in that case, however, was whether the court or the arbitrator should decide the question of arbitrability. *Id.* at 942. Any discussion concerning the application of extra-statutory criteria to arbitration awards set forth in the Court's opinion was dicta.

The fact is that this Court never has resolved the question raised by this Petition. This lack of resolution is reflected in the disarray of the lower courts' decisions. This Petition offers the Court an opportunity to settle this

important question. MRS respectfully submits that the Court should accept this opportunity.

B. This Court Should Grant This Petition Because The Eighth Circuit Erroneously Ruled That Where A Question Possessing Jurisdictional Implications Is Intertwined With The Merits Of An Arbitration Decision, The Federal Courts Not Only May But Must Disregard This Decision

The second issue in this case is whether a Federal Court to which an arbitration award is submitted for confirmation may independently determine a question possessing jurisdictional implications where the jurisdictional question is inextricably intertwined with the merits of the case and necessarily was resolved by the arbitrator. The Tribe presents a scattering of arguments for the position that the Court should not grant certiorari on this issue. None is persuasive.

The Tribe states that "[t]he first problem with petitioner's argument on this point is that none of the cases it cited dealt with arbitration, and therefore are factually remote to the case before the court." Brief in Opposition at 13. This point is not novel. MRS conceded in its Petition that this factual distinction between the cases exists. Petition for Writ of Certiorari at 27. This fact, however, does not mean that the Court should reject this case. The cases cited by MRS are closely analogous to the instant case. These cases strongly support MRS's argument. In light of the established federal policy favoring the enforcement of arbitration agreement, this Court should establish that the same rule applies in the instant case.

The Tribe further asserts that "the jurisdictional issue was not in any way 'intertwined' with the merits of the case, or the arbitration award." Brief in Opposition at 13. This puzzling assertion is not supported by the facts. The jurisdictional question identified by the Eighth Circuit may be stated as follows: whether the Tribe's waiver of its tribal sovereign immunity was broad enough to permit the relief awarded by the arbitrator. *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852-854 (8th Cir. 2001) (App. at 6-11). The arbitrator necessarily resolved this issue when she issued her award.[2] As a result, the jurisdictional question not only was "intertwined" with the merits, but it was identical to the case decided on the merits.

The Tribe next avers that "[s]overeign immunity has always been viewed by the courts as a limitation on their jurisdiction, and as a matter for the court to examine and decide on its own." Brief in Opposition at 14. The first half of this statement undeniably is true; sovereign immunity is a jurisdictional issue. The latter allegation, however, is erroneous. In cases where a jurisdictional issue is intertwined with the merits, the proper approach is to assume jurisdiction exists and deal with the objection as an attack on the merits of the plaintiff's case. *See* Petition for Writ of Certiorari at 24-25 and cases cited therein. The Tribe's unsupported assertion that parties may ask a court to intrude on the responsibilities of the finder of fact by challenging federal jurisdiction does

---

[2] The arbitrator could not have awarded the relief she selected without first determining that this relief was not contemplated by the Tribe's waiver of its immunity.

nothing to impair the case for certiorari in this proceeding.

The Tribe finally maintains that the real issue in this case is whether the court or the arbitrator should decide whether a question is arbitrable. Brief in Opposition at 15-16. This assertion is erroneous. As set forth above in this memorandum, the parties stipulated that each claim filed in the arbitration proceeding was subject to arbitration. (App. at 58-60). The District Court entered an Order incorporating this stipulation (App. at 47-48), and the Tribe did not appeal this Order.[3] Thus, the question of arbitrability was not before the Eighth Circuit, and is not at issue in this Petition.

C. Intervention By This Court Is Imperative

The ultimate question in this case is whether the federal policy favoring arbitration is to be maintained. As set forth above in this memorandum, the FAA establishes a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Const. Co.*, 460 U.S. 1, 24 (1983); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). The "unmistakably clear" purpose of the FAA is to ensure that arbitration, when selected by the parties to a contract, be "speedy and not subject to delay or obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395,

---

[3] Even if the Tribe had attempted to appeal this Order, this appeal would not have been effective. *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928) ("a decree that appears to have been entered by consent, is always affirmed, without considering the merits of the case.").

404 (1967). The Court regularly has accepted arbitration cases in recent years where necessary to effectuate this policy.

The determination of the standard of review to be applied to an arbitration award is critical to the achievement of this policy objective. Further, the deep split between the circuits makes it apparent that the lower courts are not likely to resolve this issue without leadership from this Court. MRS accordingly, and respectfully, suggests that intervention on the part of the Court is imperative.

CONCLUSION

For the foregoing reasons, this Court should grant MRS' Petition for a Writ of Certiorari.

Dated this 19th day of April, 2002.

Respectfully submitted,

BREGA & WINTERS P.C.

BRIAN A. MAGOON
JOHN G. NELSON*
1700 Lincoln Street, Suite 2222
Denver, CO 80203
(303) 866-9400

Counsel of Record